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to be sound when both parties know it to be unsound (*Hubbard v. Norton*, 10 Conn. 423; *Beach v. Miller*, 51 Ill. 206); but the general rule is that a general warranty does not cover defects which the buyer must have observed. WILLISTON ON SALES, 207. In *Haldane v. Sweet*, 55 Mich. 196, Cooley, J., laid down the rule that the existence of an alley which is visible is no excuse for failing to perform a contract to purchase land, in accordance with the reasoning of the principal case. *Kutz v. McCune*, 22 Wis. 628; *Smith v. Hughes*, 50 Wis. 620, accord. It is submitted that although the rule of the principal case seems to be more calculated to do justice where urged as a merely technical defense to a contract lawfully entered into, the opposite rule is more logical, and not so dangerous to apply. See 30 L. R. A. N. S. 833 and 48 L. R. A. N. S. for a compilation of the authorities.

WILLS—TRUST NOT CREATED BY DIRECTION TO DISPOSE OF PROPERTY "ACCORDING TO BEST JUDGMENT."—A will directed the executor and another named person "to divide and distribute the residue according to their best judgment." In a bill for a construction of the will, *held*, there was no trust, express or implied, but an unqualified power of appointment which the court could not control. *Harvey v. Griggs* (Del., 1920), 111 Atl. 437.

There are two possibilities in such a case. *First*, the language may be interpreted as an absolute power of disposition, uncontrollable by the court. Second, it may be regarded as creating a trust which is void for indefiniteness, and there will be a resulting trust for the heirs or next of kin. In the following cases no trust was implied: "to be at the disposal of his wife in and by her last will and testament to whom she shall think fit and proper to give the same," *Robinson v. Dungate*, 2 Vern. 181; "to be disposed of unto such person or persons \* \* \* as they in their discretion shall think proper and expedience," *Gibbs v. Rumsey*, 2 V. & B. 294; to executors to dispose of "as they in their discretion shall think fit," *Paice v. Archbishop of Canterbury*, 14 Ves. Jr. 364; to be disposed of "as the trustee hereof for the time being in the uncontrolled absolute discretion or pleasure of such trustee shall see fit," *Norman v. Prince*, 40 R. I. 402. In the following cases a resulting trust for the heirs or next of kin was imposed: "Upon trust to \* \* \* dispose of the ultimate residue to such objects of benevolence and liberality as the bishop \* \* \* in his own discretion shall most approve of," *Morice v. Bishop of Durham*, 9 Ves. Jr. 656; "in trust to expend solely for benevolent purposes in their discretion," *Willets v. Willets*, 103 N. Y. 650; "in trust to be distributed and disposed of as he pleases," *Haskell v. Staples*, 116 Me. 103; "to such charitable, educational and scientific purposes as in your judgment will most substantially benefit mankind," *Tilden v. Green*, 103 N. Y. 29. For many other cases see AMES, CASES ON TRUSTS [2nd Ed.], p. 93, note; 37 L. R. A. (N. S.) 400. Having determined in the instant case that the executor took an arbitrary power of disposition, the case is simple of solution. If he is willing to carry out the obvious intention of the testator, the court cannot prevent him. *Norman v. Prince*, *supra*. But if it is clear that the executor is not to take beneficially (courts have seized upon the words

"in trust" or "to trustees" as controlling, though in *Norman v. Prince*, *supra*, it is denied that they are significant), and that the trust is not charitable, the fact that there is no beneficiary who can enforce the trust has caused most courts to allow it to fail. *Morice v. Bishop of Durham*, *supra*. Where, however, the trustee is willing to act in such cases, there would seem to be no reason for refusing to permit him to effectuate the intention of the testator. *Re Gibbon* [1917], 1 I. R. 448. For arguments on both sides of this question see 5 HARV. L. REV. 389 and 15 HARV. L. REV. 509.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—SPORTIVE ACT OF CO-EMPLOYEE.—Where an employee while devoting his time to his work was struck in the eye by an apple thrown by a fellow servant engaged in horseplay, it was *held* that the injury was one "arising out of and in the course of his employment," within the Workmen's Compensation Law. *Leonbruno v. Champlain Silk Mills* (N. Y., 1920), 128 N. E. 711.

The general rule under the English Workmen's Compensation Act is that an employee who is injured while "larking" or while in the performance of some sportive act cannot recover, for the reason that the injuries are not regarded as arising out of the employment. *Fitzgerald v. Clarke & Son* [1908], 2 K. B. 796; *Wilson v. Laing* [1909], Court of Session, 1230; *Wrigley v. Nasmyth, Wilson & Co.* [1913], W. C. & Ins. Rep. 145. To the same effect are most of the American decisions. *Thompson v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. W. C. C. 145; *Matter of Stilwagon v. Callan Bros.*, 224 N. Y. 714; *In re Zelavzmi*, 1 Ohio Ind. Comm. Bull. (No. 7) 87, (No. 48427, 1914), 8 N. C. C. A. 286; *Payne v. Industrial Comm.* (Ill., 1920), 129 N. E. 122. The reason for refusing the award is that the claimant has, by himself engaging in the horseplay, suspended his work and temporarily stepped outside his employment. The New Jersey court has gone even farther by declaring that the employer is not liable for an injury due to horseplay "whether the injured party instigated the occurrence or took no part in it; for, while an accident happening in such circumstances may arise in the course of, it cannot be said to arise out of, the employment." *Hulley v. Moosbrugger*, 88 N. J. L. 161. To the same effect, see also the two Michigan cases of *In re Boelema* and *Ratkowski v. Am. Car. & Foundry Co.*, 5 N. C. C. A. 798. The principal case, in drawing the line between those cases in which the claimant did and those in which he did not take part in the sportive acts which resulted in the injury, has the support of a number of decisions, both American and English. *Knopp v. Am. Car & Foundry Co.*, 186 Ill. App. 605; *Pekin Cooperage Co. v. Industrial Board*, 277 Ill. 53; *In re Mack*, 1 Ohio Ind. Comm. Bull. (No. 7) 120 (No. 37914, 1914); *Shaw v. Macfarlane*, 52 Sc. L. R. 236. The extension of the operation of the Workmen's Compensation Acts to the latter class of cases may, perhaps, be justified upon the ground that these statutes are remedial and should be broadly interpreted. *Moore v. Lehigh Valley Ry. Co.*, 154 N. Y. S. 620. But, even so, the reasoning in the principal case to the effect that the injury arises out of the business because skylarking among the employees is "something